

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1329

ROGER BROWN, et. al.,

PETITIONERS,

VS

ROBERT R. BRYAN, et. al.,

RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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TO THE HONORABLE, THE CHIEF JUSTICE OF
THE UNITED STATES AND THE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE
UNITED STATES:

The respondents herein respectfully pray that the
decision of the Supreme Court of Alabama entered in
this proceeding on October 1, 1976 be allowed to stand
without review by this Court and that the pending
petition for writ of certiorari be denied.

OPINION BELOW

The opinion, judgement and denial of application
for rehearing by the Supreme Court of Alabama,
reported at 339 So. 2d 577 appears in the Appendix of
the petitioner's Petition For Writ of Certiorari To The
Supreme Court of Alabama filed heretofore.

JURISDICTION

The judgement of the Supreme Court of Alabama
was rendered on October 1, 1976 and a timely
application for rehearing was denied on December 3,
1976 and this petition for certiorari was filed within 90
days from that date. This Court's jurisdiction is
invoked under the provisions of 28 U.S.C. P1257(3).

QUESTIONS PRESENTED

Whether a public official defamation plaintiff who is permitted to establish liability under a less demanding standard than that proscribed in *New York Times v. Sullivan*, *infra*, by use of the presumptions of falsity and malice inherent in the doctrine of libel *per se* must prove "actual injury" to establish entitlement to compensatory damages and "actual malice" to establish entitlement to punitive damages under the standards of *Gertz v. Welch*, *infra*.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person within its jurisdiction the equal protection of the laws.

RESTATEMENT OF THE CASE

The petitioner's tell the Court that the Supreme Court of Alabama "found no error in the trial court's direction of a verdict on the issue of liability *vel non*, thus affirming the trial court's decision that the 'actual malice' or 'reckless disregard' standard of *New York Times* had been met". Petition For Writ of Certiorari, p. 5. This statement misrepresents the procedural posture of this case in two crucial respects and in the end undermines the correctness of the plaintiff-petitioner's entire argument before this Court.

First, the record is clear beyond doubt that the trial court did not "by its directed verdict on liability conclude that the *New York Times* standard of 'reckless disregard' had been met". Petition For Writ of Certiorari, p. 4. In its final directions to the jury the trial court applied the doctrine of libel *per se* to the liability issue as well as the damage issue and did not evidence even the slightest awareness of the *New York Times* restrictions on the presumptive aspects of that doctrine. The trial court stated to the jury:

Because of the absence of any evidence of the truth of that charge made against the plaintiffs in the paper filed in the Federal Court, it is presumed that that charge is false and was made maliciously wherefore your verdict in each of these cases should be for the plaintiff and you should award the plaintiff as damages such a sum as in your sound judgment would reasonably compensate the plaintiff for injury to his reputation, to which amount you, at your discretion, may or may not add additional damages, called 'punitive damages' - that is to say, damages for

purposes of punishing the defendants.
(R: 242-243).

Secondly, the decision of the Supreme Court clearly did not affirm "the trial court's decision that the 'actual malice' or 'reckless disregard' standard of *New York Times* had been met." As already pointed out, the trial court did not find that the 'actual malice' standard had been met. More importantly, the Supreme Court did not affirm such a fictitious decision of the trial court. The Supreme Court expressly reserved ruling on a number of issues raised by the defendant - respondents below:

We do not find it necessary to consider all of the issues raised in their briefs by appellants, because we have determined that the case must be reversed. Appellants urge us to hold erroneous the trial court's charge on the presumption of malice and the recovery of punitive damages, contending that proof of actual injury is affirmatively required in defamation cases, absent actual malice.

* * *

Here, there was entirely absent any proof of actual injury to these plaintiffs. Nor was the jury instructed upon the requirement of actual malice as a predicate to the award of punitive damages. The failure to instruct the jury on the requirement of proof of actual malice for an award of punitive damages and the instruction authorizing compensatory damages absent proof of actual injury, constituted reversible errors. 339 So. 2d at 583-584.

There is not the slightest indication in the Supreme Court of Alabama's decision that they were affirming the trial court's presumption of falsity and malice on the liability issue.

REASONS FOR DENYING THE WRIT

The petitioner's tell the Court that a Writ of Certiorari be directed to the Supreme Court of Alabama because it required proof of actual malice to support an award of punitive damages and proof of actual injury to support an award of compensatory damages. The plaintiff-petitioner bases its entire argument on the false assumption that the "actual malice" standard for proof of liability in a defamation suit brought by a public official can be met through the presumption of falsity and malice inherent in the libel per se doctrine. To accomplish a "double play" on the First Amendment guarantees established in *New York Times v. Sullivan*, *supra*, the petitioner next argues that the "actual injury" requirement established in *Gertz v. Welch*, 418 U.S. 323, 94 S. Ct. 2997, 21 LED 789 (1974), can be met by carrying over the "actual malice" presumption from the liability phase of the trial. In practical effect the petitioner's argument would abrogate the actual malice requirement in both the liability and damage phases of the trial by reestablishing the doctrine of libel per se in Alabama.

This Court definitively settled the question of the Constitutionality of Alabama's libel per se doctrine in *New York Times v. Sullivan*, *supra*, where it was said:

We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. While Alabama law apparently requires proof of actual malice for an award of punitive damages, where general damages are concerned, malice is 'presumed'. Such a presumption is inconsistent with the federal rule.

'The power to create presumptions is not a means of escape from constitutional restrictions.' [citation omitted]. Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. Because of this uncertainty, the judgment must be reversed and the case remanded.

The posture of the case now before the Court is almost identical to that in *New York Times v. Sullivan*, *supra*. The trial judge invoked the libel per se presumption of falsity and malice as to both the liability and damage issues and refused to differentiate between the evidence required to find compensatory damages as opposed to punitive damages. As the Supreme Court of Alabama expressly found from an extensive review of the record at trial "there was entirely absent any proof of actual injury to these plaintiffs. Nor was the jury instructed upon the requirement of actual malice as a predicate to the award of punitive damages."

The petitioner's argument seeks to thread its way through the *New York Times* and *Gertz* requirements by proclaiming the trial court's presumption of falsity and malice to satisfy the "actual injury" standard of *Gertz*. The *Gertz* decision, however, plainly states that the "private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury." *Gertz v. Welch*, 418 U.S. 323 (1974). (emphasis added)

The plaintiff-petitioner, herein, established liability under the least demanding standard in all the law — the

libel per se presumption of falsity and malice. Under such a liberalized standard of proof, the plaintiff need only prove the publication of words accusing another person of a crime and the burden shifts to the defendant to prove the truth of the contested statements. In the trial below this was all that the plaintiff-petitioner proved — a simple publication in a Federal Court Removal Petition of words accusing two assistant district attorneys of corruption in office. With this and nothing more the defendant/respondent was saddled with the task of proving the truth of his allegations. When the defendant refused to prove truth because the plaintiff had not even attempted to prove the falsity and maliciousness of the allegations of corruption in office, the trial Court "presumed" the Removal Petition to be false and malicious and instructed the jury to "at your discretion" add punitive damages.

Clearly the plaintiff-petitioner was given benefit of a "less demanding standard" of liability than required in *New York Times*. Because the Supreme Court of Alabama did "not find it necessary to consider all of the issues raised in their brief by appellants" does not alter this obvious fact. Having been given a "free ride" on the liability issue the plaintiff-petitioner cannot now argue that it should similarly be excused from proving any actual injury and that the actual malice essential to support punitive damages should be waived.

CONCLUSION

The Supreme Court of Alabama has correctly held that a public official defamation plaintiff must prove actual malice without any evidentiary presumptions of falsity and malice in order to recover damages for criticism of his official conduct. Accordingly, the Petition for Writ of Certiorari to the Supreme Court of Alabama should be denied.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Robert R. Bryan, one of the attorneys for the defendant-respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 28th day of March, 1977 I served three copies of the foregoing Brief In Opposition To Petition For Writ of Certiorari To The Supreme Court of Alabama as follows:

1. By mailing in the United States Mail three copies of same in a duly addressed envelope with first class postage prepaid to the Honorable James M. Fullan, Jr., 900 Massey Building, Birmingham, Alabama 35203.

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